UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

In re: Operation of the Missouri River System Litigation	Cause No. MDL-1555-PAM
STATE OF MISSOURI, ex rel. Jeremiah W. (Jay) Nixon, Plaintiffs, v. UNITED STATES ARMY CORPS OF ENGINEERS, FRANCIS J. HARVEY, SECRETARY OF THE ARMY, UNITED STATES DEPARTMENT OF DEFENSE, and BRIGADIER GENERAL GREGG F. MARTIN, Defendants.	**CIVIL NO. 06-CV-01616 (PAM)** **BRIEF OF *AMICUS CURIAE* STATE OF NEBRASKA**

Amicus Curiae State of Nebraska ("Nebraska" or the "State") respectfully submits this brief for the Court's consideration concerning only the scope of the remedy sought by Plaintiff State of Missouri in this action. Nebraska takes no position concerning the U.S. Army Corps of Engineers' ("Corps") liability for alleged violations of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4231, *et seq.*, arising from the Corps' adoption of the so-called "spring pulse" Missouri challenges here. *See* Missouri's Motion for Summary Judgment (Dkt. No. 18) at 1 (¶ 1). Nebraska is concerned, however, that the remedy Missouri seeks – an injunction against the implementation of "any other spring rise plan including the so-called Amended Bi-Op default plan" – is overbroad, and if granted by this Court, could cause the Corps to fall out of compliance with its obligations under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531

et seq. *Id.* at 4. Such a result is likely to prompt yet more litigation in the Missouri River Basin, an outcome that should be avoided if at all possible.

Factual Background

The U.S. Fish and Wildlife Service ("FWS") issued an amended biological opinion in December 2003 ("Amended BiOp") concerning the impact of the Corps' dam and reservoir operations on listed species and designated critical habitat in the Missouri River. *See* Supplemental Administrative Record ("SAR") 3, Exhibit 1914. As part of a "reasonable and prudent alternative" to the Corps' planned operations, the Amended BiOp called for a rise in water levels during the spring, which would provide spawning cues and floodplain connectivity in late spring and early summer. Rather than mandating the specific parameters of this "spring rise," the Amended BiOp afforded the Corps two years to develop those parameters. The Amended BiOp, however, contained a spring rise element to be implemented beginning on March 1, 2006 in the event that the Corps was unable to develop a suitable spring rise that met with FWS' approval (the "Default Rise"). *Id.* at 230-35.

In the spring of 2004, this Court, on multiple cross-motions for summary judgment, reviewed the validity of the Amended BiOp. Against myriad challenges, the Court upheld the Amended BiOp including, *inter alia*, the Default Rise. *In re Operation of the Missouri River System Litigation*, 363 F. Supp. 2d 1145 (D. Minn. 2004). In discussing one such challenge, the Court explained:

> … [T]he 2003 RPA does not eliminate flow changes altogether. Although it may not specifically require the implementation of flow changes in order to preserve the plover and the tern, the RPA requires the Corps to develop a water plan that includes a spring rise and low summer flow. In the event the Corps fails to develop such a plan by March 1, 2006, a default water plan that includes both a spring rise and low summer flow must be implemented. (FWS AR 1457 at 33761-62.)

Id. at 1158, n.4. Addressing this same provision later in the opinion, this Court held:

> American Rivers also complains that the magnitude of the spring rise in the 2003 RPA is greatly reduced from the 2000 RPA. In the 2000 RPA, the spring rise was included to provide a spawning cue for the sturgeon, and to create and maintain sandbar habitat for the plover and the tern. Although the 2003 RPA does not require a spring rise of the same absolute magnitude as the 2000 RPA, it requires a bimodal spring rise. Water flows do not effectively construct habitat for the plover and the tern, and a bimodal spring pulse may provide greater spawning cues for the sturgeon. (FWS AR 1457 at 33761, 33765; FWS AR 1291 at 31067-72.) Any change in flood plain connectivity as a result of a lower absolute magnitude is also minimal. (Corps AR 1332 at 45605.) Although the spring rise in the 2003 RPA may differ from that in the 2000 BiOp, it is not unlawful.

Id. at 1159. This Court's conclusions regarding the Default Rise were affirmed on appeal. *In re Operation of the Missouri River System Litigation*, 421 F.3d 618, 365-36 (8th Cir. 2005).

Discussion

The National Environmental Policy Act imposes on all agencies and Federal officials "a legislative mandate and a responsibility to consider the consequences of their actions on the environment." S. Rep. No. 296, 91st Cong., 1st Sess. 14 (1969). However, NEPA's mandate to federal agencies "is essentially procedural." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978). *See also Aberdeen & Rockfish R. Co. v. Students Challenging Regulatory Agency Procedures (S.C.R.A.P.)*, 422 U.S. 289 (1975). Although NEPA compliance is likely to affect an agency's substantive decision, NEPA does not require agencies to reach a certain substantive result. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989) ("it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process"); *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989) ("NEPA does not work by mandating that agencies achieve particular substantive environmental results."); *Sierra Club v. U.S. Forest Serv.*, 46 F.3d 835,

837 (8th Cir. 1995) (NEPA "imposes procedural requirements, but not substantive results on agencies"). "NEPA merely prohibits uninformed - rather than unwise - agency action." *Robertson*, 490 U.S. at 351.

A procedural violation of NEPA certainly may be remedied by the issuance of an injunction prohibiting continuation of the underlying action subject to NEPA. *Minnesota Pub. Interest Research Group v. Butz*, 358 F. Supp. 584, 627 (D. Minn. 1973). The Supreme Court cautioned, however, that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). Thus, not every violation of NEPA produces a right to blanket injunctive relief. As this court has observed, "NEPA violations do not ***require*** the issuance of an injunction." 358 F. Supp. at 627–28 (emphasis added). *See also Environmental. Def. Fund, Inc. v. Froehlke*, 477 F.2d 1033, 1036 (8th Cir. 1973). Rather, a court must consider all the circumstances in determining whether a project may be permitted to proceed pending compliance with NEPA's procedural requirements. *Id.* at 1037.

In the NEPA context, courts should look to traditional principles of equity and "pay particular regard for the public consequences of employing the extraordinary remedy of injunction." *National Audubon Society v. Department of Navy*, 422 F.3d 174, 201 (4th Cir. 2005) citing *Weinberger*, 456 U.S. at 312-13. Where the harms of a particular injunctive remedy outweigh the benefits, a court may decline to adopt it. *Id.* "NEPA creates no exception to the traditional principles that govern injunctive remedies." *Id.* As explained by the Fourth Circuit:

> In sum, a court should not automatically enjoin agency action whenever it finds a NEPA violation. As in all injunction cases, a court must balance the harms particular to each case in assessing whether an injunction is justified and how far it should reach. And

> it should take care not to craft a remedy that extends beyond what NEPA itself and its implementing regulations require.

Id. at 202 (so concluding after reviewing 40 C.F.R. §§ 1506.1(a) and 1502.2(f)); *compare State of Wisconsin v. Weinberger*, 745 F.2d 412, 426 (7th Cir. 1984) ("When a court has found that a party is in violation of NEPA, the remedy should be shaped so as to fulfill the objectives of the statute as closely as possible, consistent with the broader public interest ... . The court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overly broad injunction.") (Citations omitted).

In this case, Missouri challenges the "spring pulse" alternative selected by the Corps in its Memorandum of Decision dated February 28, 2006. SAR 8, Exhibit 3088. Nebraska, again, takes no position regarding the legitimacy of that alternative or the circumstances surrounding its selection. If this Court concludes Missouri is entitled to prevail on its claims, however, the Court should not enjoin the Corps from implementing ***all*** spring rise alternatives. The Default Rise was challenged (albeit by another plaintiff), but upheld in this Court and in the Eighth Circuit Court of Appeals. To the extent Missouri (or any other party to the earlier multi-district litigation) sought to mount a direct challenge to the Default Rise, that challenge would be barred by the doctrine of *res judicata*. *See, e.g., U.S. v. Gurley*, 43 F.3d 1188 (8th Cir. 1995).

Nebraska does not understand Missouri's claim as attacking directly the Default Rise. Nevertheless, Missouri's requested relief would bar its implementation. If the Corps were enjoined from implementing a spring rise of any kind, then the Corps would be unable to comply with the reasonable and prudent alternative contained in the Amended BiOp, and the Corps would fall out of compliance with the ESA. This Court previously observed that federal agencies' strict compliance with NEPA's procedural mandates may be excused when it would

result in irreconcilable and fundamental conflicts with "other statutory obligations." *In re Operation of the Missouri River System Litigation*, 03-MD-1555 (PAM) (Memorandum and Order dated Feb. 26, 2004) *citing Flint Ridge Develop. Co. v. Scenic River Assoc.*, 426 U.S. 776, 789 (1976). Any remedy the Court fashions in this case should avoid a conflict between the Corps' NEPA and ESA obligations.

Finally, noncompliance with the Amended BiOp's reasonable and prudent alternative would, at a minimum, constitute a changed circumstance warranting the re-initiation of consultation pursuant to Section 7 of the ESA. *See* 50 C.F.R. 402.16. This undoubtedly would incite further controversy in the Missouri River Basin concerning the impact of Corps operations on listed species and critical habitat in the River. Additional litigation would inevitably ensue.

Conclusion

The Default Rise, validated by FWS and the courts, is a legitimate alternative by which the Corps can remain compliant with the Amended BiOp's reasonable and prudent alternative pending the outcome of further NEPA analysis, if necessary. For the foregoing reasons, if Missouri prevails in the liability phase of this action, the Court should enjoin the Corps from implementing the "spring pulse" alternative adopted on February 28, 2006, and should affirmatively direct the Corps to implement the Default Rise until NEPA compliance is completed.

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Respectfully submitted this 25th day of August, 2006.

STATE OF NEBRASKA

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